

This Opinion is Not a  
Precedent of the TTAB

Mailed: June 1, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Headstrong Foundation*

*v.*

*Head Strong Project Inc.*

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Opposition No. 91249047

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John J. O'Malley of Volpe Koenig  
for Headstrong Foundation.

Glenn A. Gundersen, Jennifer Insley-Pruitt, Jacob R. Porter and Thomas Kienzle  
of Dechert LLP for Head Strong Project Inc.

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Before Taylor, Wolfson and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Head Strong Project Inc. seeks registration of HEADSTRONG, in standard characters, for “charitable fundraising in connection with mental health programs for military veterans” in International Class 36, and “mental health services, namely, providing assessment, counseling, and treatment services to military veterans in connection with post-traumatic stress, addiction, anxiety, depression, trauma, grief, loss and anger management” in International Class 44.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88063121, filed August 2, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) based on alleged first use dates of May 11, 2012.

In its notice of opposition, Opposer Headstrong Foundation alleges prior use of, and ownership of an application to register, the mark HEADSTRONG FOUNDATION (“FOUNDATION” disclaimed) for “charitable fundraising services for patients and families affected by cancer,”<sup>2</sup> and that the parties’ services are related. As grounds for opposition, Opposer alleges that use of Applicant’s mark would be likely to cause confusion with Opposer’s mark.<sup>3</sup> In its answer, Applicant denies the salient allegations in the notice of opposition.

## I. The Record and Evidentiary Objections

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s involved application. In addition, Opposer introduced:

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<sup>2</sup> Application Serial No. 88110610, filed September 10, 2018 under Section 1(a) of the Act, based on first use dates of September 1, 2006.

<sup>3</sup> While the notice of opposition also alleges, without further explanation, that “Applicant’s mark falsely suggests a connection between Opposer and Applicant that does not exist,” 1 TTABVUE 4, the Electronic System for Trademark Trials and Appeals (“ESTTA”) coversheet for the pleading identifies likelihood of confusion as Opposer’s only claim. More importantly, the notice of opposition does not sufficiently state a claim for false suggestion. *Schiedmayer Celesta GmbH v. Piano Factory Group, Inc.*, 2019 USPQ2d 341894 \*6 (TTAB 2019), *aff’d*, 11 F.4<sup>th</sup> 1363 (Fed. Cir. 2021) (setting forth elements of a false suggestion claim). In any event, Opposer did not pursue a false suggestion claim at trial, or argue false suggestion in its Trial Brief, so even if the claim was pleaded, it has been waived. *Alcatraz Media, Inc. v. Chesapeake Marine Tour Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013), *aff’d* 565 F. App’x 900 (Fed. Cir. 2014).

Citations to the record refer to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

Notice of Reliance (“Opp. NOR”) on printed publications and Internet printouts. 23 TTABVUE.<sup>4</sup>

Testimony deposition of Cheryl Colleluori, its President, and the exhibits thereto (“Colleluori Tr.”). 28-31 TTABVUE.

Rebuttal testimony declaration of Ms. Colleluori, and the exhibits thereto (“Colleluori Dec.”). 35 TTABVUE.<sup>5</sup>

Applicant introduced:

Testimony declaration of Colonel Jim McDonough, Jr., its Executive Director, and the exhibits thereto (“McDonough Dec.”). 32 TTABVUE.

NOR on Internet printouts (“App. NOR”). 33 TTABVUE.

The parties have made a number of evidentiary objections. Opposer’s hearsay objections to the admissibility of Internet printouts Applicant submitted via notice of reliance alone, 37 TTABVUE 28, without accompanying testimony, are overruled. While Opposer is of course correct that because these materials are not accompanied by testimony, they may not be considered for the truth of the matters asserted therein, they are admissible for what they show on their face. *Safer Inc. v. OMS Inv. Inc.*, 94 USPQ2d 1031, 1037 n.14 and 1040 (TTAB 2010). Sometimes what Internet printouts and printed publications show on their face is relevant to trademark cases, including likelihood of confusion cases. *Harry Winston, Inc. & Harry Winston S.A. v.*

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<sup>4</sup> Opposer also submitted its own interrogatory responses, but they “may be submitted and made part of the record only by the receiving or inquiring party ....” Trademark Rule 2.120(k)(5). Therefore, we have not considered the responses, though we have considered the interrogatories themselves for the limited purpose set forth in fn. 9.

<sup>5</sup> Opposer essentially re-filed the rebuttal declaration at 36 TTABVUE. Opposer withdrew the Rebuttal NOR it filed at 34 TTABVUE, and therefore we have not considered it. *See* 39 TTABVUE 19.

*Bruce Winston Corp.*, 111 USPQ2d 1419, 1428 (TTAB 2014) (“such materials are frequently competent to show, on their face, matters of relevance to trademark claims (such as public perceptions), regardless of whether the statements are true or false. Accordingly, they will not be excluded outright, but considered for what they show on their face.”). *See also In re Ayoub Inc.*, 118 USPQ2d 1392, 1399 n.62 (TTAB 2016); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USQ2d 1458, 1467 n.30 (TTAB 2014).

Opposer’s objections to Col. McDonough’s testimony regarding events transpiring and documents created prior to his joining Applicant, 37 TTABVUE 28, are overruled. Col. McDonough testifies that he is “familiar with the history and operations of [Applicant],” and that his testimony is based on his “own knowledge and understanding or from my review of the records and documents of [Applicant], which are prepared and kept in the regular course of business.” 32 TTABVUE 2-3 (“McDonough Dec. ¶¶ 3-4). *Ava Ruha Corp. v. Mother’s Nutritional Center, Inc.*, 113 USPQ2d 1575, 1578-79 (TTAB 2015). Opposer’s objection to Col. McDonough’s testimony as “hearsay” because it is “based on documents created prior to him becoming Executive Director in 2020,” 37 TTABVUE 28, is overruled because the testimony does not include statements by non-testifying declarants. Fed. R. Evid. 801(c); *see also* Fed. R. Evid. 803(6).

Opposer’s objections to Col McDonough’s testimony, on the ground that it is based “on Exhibits that were not produced during the discovery in this case and do not contain any ‘bates’ or other numbering format,” 37 TTABVUE 28, 30, 31, are also

overruled. Except under circumstances not relevant here,<sup>6</sup> parties are not limited to relying on materials produced during discovery, or on Bates-stamped documents. Opposer's objections to printouts from Applicant's website and other exhibits on the ground that they do not "include the date the website was accessed or printed [and] the URL," 37 TTABVUE 29, are overruled because these requirements apply when these types of materials are submitted by notice of reliance alone. *See* Trademark Rule 2.122(e) (cited by Opposer). Here, Applicant submitted these website materials not through that Rule which grew out of *Safer*, 94 USPQ2d at 1031, but instead through the Colonel's direct testimony, which authenticated the documents; they are not hearsay. Furthermore, to the extent exhibits to Col. McDonough's declaration contain what would otherwise be considered "hearsay," the business records exception applies. 32 TTABVUE 3 (McDonough Dec. ¶ 4) ("all exhibits attached hereto are records kept in the ordinary course of [Applicant's] business or compiled from records kept in the ordinary course of [Applicant's] business"); Fed. R. Evid. 803(6).

Opposer's objections to Exhibits 9-13 and 20-21 to Applicant's cross-examination of Ms. Colleluori are overruled, to the extent Opposer objects to Ms. Colleluori's testimony about the documents. However, the documents, notwithstanding that Opposer produced Exhibit 9, are only admissible for what they show on their face, not

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<sup>6</sup> To the extent Opposer is attempting to rely on the estoppel sanction, it has not filed a motion to compel, Applicant has not been ordered to produce any documents requested in discovery and in any event Opposer did not file, for Board review, any discovery requests to which the documents are allegedly responsive, much less establish that the documents are responsive to Opposer's discovery requests but were not produced. *See* TBMP § 527.01(e).

their truth. Applicant concedes this and does not rely on these documents for the truth of the matters asserted therein. 38 TTABVUE 39-42.

Applicant's objections to Ms. Colleluori's rebuttal testimony declaration on the ground that it is improper rebuttal, 38 TTABVUE 43-44, are sustained. While we recognize that Opposer uses this declaration to attempt to introduce newly-discovered actual confusion evidence that came into existence after Ms. Colleluori's testimony deposition, this evidence is not rebuttal. The proper course for Opposer under these circumstances would have been to move to reopen its testimony period for the purpose of introducing the newly-discovered evidence, TBMP § 509.01(b)(2), but it did not do so. We have not considered the rebuttal testimony.

## **II. The Parties and Their Marks**

The parties are both philanthropic organizations that use HEADSTRONG in various forms for charitable fundraising and related services. Opposer donates its services to cancer patients and their families, while Applicant donates its services to military veterans.

### **A. Opposer**

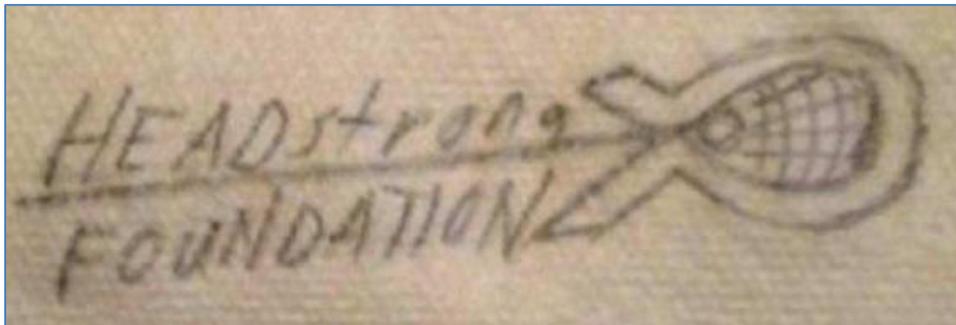
Ms. Colleluori's son Nicholas ("Nick"), then a 19 year-old freshman lacrosse player at Hofstra University, conceived non-profit Opposer Headstrong Foundation in 2006 after he was diagnosed with acute lymphoma. 28 TTABVUE 10-11, 14-15 (Colleluori Tr. 8-9, 12-13). The organization received its "formal paperwork," i.e. incorporated, in June 2007. *Id.* at 9-10, 14 (Colleluori Tr. 7-8, 12).

During 14 months of "vigorous chemotherapy," Nick perceived a need to improve the cancer treatment experience, and therefore decided "to create an organization

that provides direct service to people just like” him. *Id.* at 11-12 (Colleluori Tr. 9-10). Nick, known as “Head” since he was three years old, chose the name HEADstrong for the organization, because “it just fits,” as Nick was known for his “mental and physical toughness, and that’s part of this journey with the mental game ...” *Id.* at 12 (Colleluori Tr. 10).

In November 2006 the Colleluori family was “told that there was nothing more that can be done,” and Nick was “sent home from the University of Penn[sylvania] hospital on Hospice.” *Id.* On the way home, Nick and his mother agreed that Opposer Headstrong Foundation “will continue, that other people following in [his] footsteps would benefit from my life ...,” *id.* at 13 (Colleluori Tr. 11), and Opposer has continued providing its charitable services since, including through Nick’s House and Opposer’s Quality of Life Services Program, discussed more fully below. *Id.* at 13, 17, 28-32, 42-43 (Colleluori Tr. 11, 15, 26-30, 40-41).

When he conceived the organization, Nick “wanted to really utilize the lacrosse community as a vehicle to spread awareness,” as shown in the “logo for the foundation” he created on a napkin in February 2006, shown below:



*Id.* at 15-16. 184 (Colleluori Tr. 13-14 and Ex. 1). The word “HEAD” is “always capitalized because it represents Nick. Same font that Hofstra University allowed us

to use because of his beloved, you know, university and the love that he had for that school and team.” *Id.* at 16 (Colleluori Tr. 14).

In the original “blueprint for the organization” Nick created from his hospital bed, one part of Opposer’s “Mission” was “[t]o tell my story and help others deal with cancer by expressing my opinions, experiences, and emotions.” One of Opposer’s long term goals was a “Motivational Speaking Program for cancer patients.” *Id.* at 18-20, 185 (Colleluori Tr. 16-18 and Ex. 2).

Opposer’s lacrosse connections are extensive, and it works with the National Collegiate Athletic Association (“NCAA”), as well as college and high school lacrosse teams, to raise funds for its charitable activities. *Id.* at 20-26, 36 (Colleluori Tr. 18-24, 34). In fact, since 2007, the NCAA has provided space to Opposer during the collegiate lacrosse championship tournament, specifically the tournament’s “Final Four,” allowing Opposer “the opportunity to shake hands, accept donations, sell our cancer awareness apparel,” and add to its database of donors and “constituents.” More than 30,000 fans attend the Final Four. *Id.*

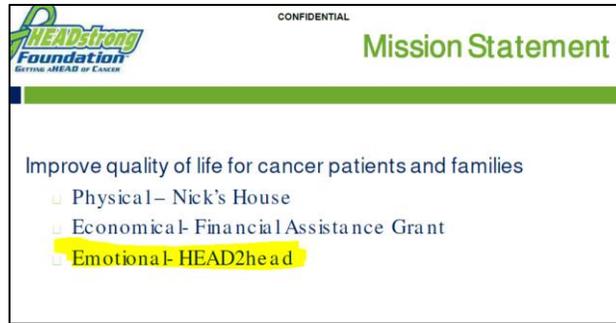
Opposer operates “Nick’s House,” a home in suburban Philadelphia it offers to families that must travel for cancer treatment.

We felt blessed that we had the University of Penn in our backyard, that if we wanted to go home we could. And that’s not the case for many, many families. In addition to that, the cost of a hotel stay, a 30-day hotel stay in the City of Philadelphia is \$10,000. Well when your wallet is empty because you have been, you know, out of work like myself, taking a leave of absence during Nick’s illness, it’s very, very challenging, you just don’t have the money. Most families that arrive here that stays at Nick’s House, they’re on a wing and a prayer. So we found the building, the

building I'm sitting in right now actually, and we purchased it and renovated it and we opened it in September; September 27<sup>th</sup>, 2011. And we've had Nick's House now for ten years. We expanded four years ago to a secondary location, we house seven families at a time at that location and our future plans would be to expand to New York and Boston and we want to be able to give families the opportunity to be together and not have to worry about where they're going to stay and how they're going to live while they're in – they're attempting to save their child's, their brother's or their spouse's life. Our one non-negotiable is it is offered at no charge to our guests.

28 TTABVUE 29-30 (Colleluori Tr. 27-28). Sometimes the American Cancer Society and the Leukemia and Lymphoma Society refer families to Nick's House. *Id.* at 30-31 (Colleluori Tr. 28-29).

Opposer's Quality of Life Services Program provides "financial, emotional and residential support to patients and families affected by cancer," including a "peer-to-peer mentoring" program called "HEAD2head." *Id.* at 42-44, 273 (Colleluori Tr. 40-42 and Ex. 8). Opposer also refers patients and families to counselors. *Id.* at 44-45 (Colleluori Tr. 42-43). Asked how long Opposer has been offering peer-to-peer mentoring, Ms. Colleluori testified "Since the beginning. Nick was the original. He counseled patients." *Id.* at 45-46 (Colleluori Tr. 43-44); *see also id.* at 145-46 (Colleluori Tr. 143-44) (on cross-examination). Opposer's 2019 Strategic Plan includes emotional support in its Mission Statement, as shown below:



*Id.* at 77-78, 473 (Colleluori Tr. 75-76 and Ex. 22) (emphasis added). Opposer includes the card reproduced below in its “comfort kits” for “patients to, you know, take with and reach out and contact us if somebody needs to talk, you know, they want a buddy”:

**HEAD to HEAD**  
Peer to Peer Cancer Support for Patients & Caregivers  
Powered by the HEADstrong Foundation

HEADSTRONG FOUNDATION 000489

### NEED TO TALK?

HEAD to HEAD offers you a chance to connect with a network of cancer patients, caregivers and survivors. who have been in your shoes. You are not in this fight alone and we are here to help. Whether its mentoring, guidance or just an ear to listen, we know it's beneficial to talk to someone who understands. Let us be your support.

To make the connection email [H2H@HEADstrong.org](mailto:H2H@HEADstrong.org)  
Visit [www.HEADstrong.org](http://www.HEADstrong.org) for more information.

**HEADstrong Foundation**  
Improving Lives Affected by Cancer

HEADSTRONG FOUNDATION 000490

*Id.* at 79-82 and 31 TTABVUE 8 (Colleluori Tr. 77-80 and Ex. 23) (emphasis added).

Sometimes Opposer receives communications intended for other organizations, including Applicant. For example, an accounting department e-mailed Opposer requesting “a copy of acknowledgement letter for our matching donation for our employee.” 28 TTABVUE 48-50, 311-312 (Colleluori Tr. 46-48 and Ex. 9). The company seeking to make a matching donation sponsors one of Applicant’s fundraising events, *Id.* The company’s sponsorship relationship with Applicant made it appear to Opposer that the company was in fact trying to contact Applicant rather than Opposer. 28 TTABVUE 143-44 (Colleluori Tr. 141-42); 30 TTABVUE 142-43 (Confidential version).

On January 30, 2020, a “post-9/11 combat vet in need of help with PTSD and anxiety” e-mailed Opposer stating “I was referred to you for therapy for me, and also for me and my husband together. How do I find those services?” 28 TTABVUE 51-52, 313 (Colleluori Tr. 49-50 and Ex. 10). Opposer assumed a veteran seeking mental health services was trying to reach Applicant, and responded “[t]he organization you want is [Applicant]” and copied Applicant on the response. *Id.*

Similarly, on June 12, 2020, another veteran e-mailed Opposer stating “I have PTSD from combat and its [sic] diagnosed through the VA ... I wanted to find out if you had any recourses to help my head.” Opposer also referred this request to Applicant, for the same reason. *Id.* at 52-54, 314 (Colleluori Tr. 50-52 and Ex. 11).

In an October 11, 2019 e-mail, an accounting firm contacted Opposer seeking confirmation of a donation it believed one of its clients made to Opposer. However,

Opposer suspected, based on research, that the request was intended for Applicant, even though on cross-examination Ms. Colleluori conceded that she did not know for certain. *Id.* at 54-55, 127, 315-16 (Colleluori Tr. 52-53, 125 and Ex. 12).

A January 27, 2021 e-mail sent to Opposer made clear that it was intended for Applicant, as it began “I’ve come across an interview with your CEO Jim McDonough.” *Id.* at 56-57, 318-19 (Colleluori Tr. 54-55 and Ex. 14). The sender offered an “automated mental health support chat to do proactive outreach, automate crisis line follow-ups, and provide 24/7 support for patients between sessions.”<sup>7</sup>

The Ultimate Fighting Championship (“UFC”) apparently confused Applicant and Opposer when it held an event to support Applicant, but mistakenly “tagged” Opposer in a tweet, as shown below:



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<sup>7</sup> Ms. Colleluori described several additional, similar examples, but did not provide any specific reasons for suspecting that the communications were intended for Applicant, as opposed to another organization.

28 TTABVUE 60-62, 323 (Colleluori Tr. 58-60 and Ex. 17) (emphasis added).

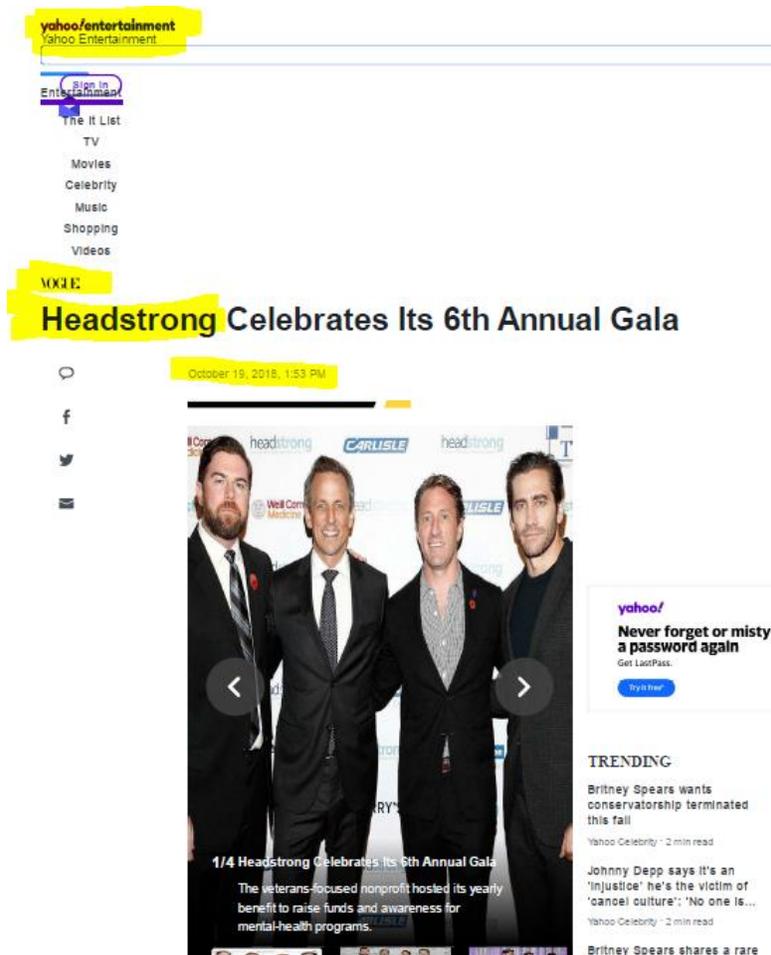
Ms. Colleluori explained the harm these types of mistakes cause Opposer and its brand as follows: “Well someone thinks that it’s us and it’s not; so somebody thinks that we’re now involved in mental health services for veterans and it’s just very confusing where I’m explaining, you know, I’m sorry, yes, we provide emotional support, but it’s for patients that are affected – and families that are affected by cancer.” *Id.* at 63 (Colleluori Tr. 61). The problems can also be more serious. Ms. Colleluori testified that when she took a call from someone who was suicidal, “it’s very concerning that they’re calling the wrong organization.” *Id.*

### **B. Applicant**

Applicant is a “nonprofit founded in partnership with Weill Cornell Medicine to provide mental health services to post-9/11 veterans. Since May 2012, [Applicant] has provided mental health treatment under its HEADSTRONG mark to thousands of veterans, active-duty service members, members of the National Guard and Reserve, and their families.” 32 TTABVUE 3 (McDonough Dec. ¶ 5). Applicant provides veterans and service members with free treatment for conditions including PTSD, anxiety, depression and anger management. *Id.* (McDonough Dec. ¶ 6). Applicant “works directly with more than 270 clinicians across 28 markets in 12 states, including New York, New Jersey, Pennsylvania, Maryland and Washington D.C.” *Id.* at 4 (McDonough Dec. ¶ 8). Applicant “has served thousands of clients in nearly 70,000 clinical sessions.” *Id.* (McDonough Dec. ¶ 10).

Applicant partners “with a variety of organizations, corporations, and foundations in furtherance of its efforts to raise funds for mental health services.” *Id.* (McDonough

Dec. ¶ 13). Applicant raises “millions of dollars” per year for its mental health programs “under the HEADSTRONG mark.” *Id.* at 5 (McDonough Dec. ¶ 14). Its fundraising efforts “have attracted significant press attention,” as well as celebrity support from Seth Myers, Adam Driver and Jake Gyllenhaal, among others, as shown below



*Id.* at 5-6, 258 (McDonough Dec. ¶¶ 15-20 and Ex. M).

Applicant “has developed a national presence.” *Id.* at 6 (McDonough Dec. ¶ 24). Col. McDonough has “not been informed of any consumers becoming confused as between our organization and its services and [Opposer] and its services.” *Id.* at 7 (McDonough Dec. ¶ 28).

### III. Opposer's Entitlement to a Statutory Cause of Action<sup>8</sup>

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at \*3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

Here, Opposer's use of its pleaded mark establishes that it is entitled to oppose registration of Applicant's mark. *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark "is sufficient to support opposer's allegations of a reasonable belief that it would be damaged ....").

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<sup>8</sup> Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

Applicant does not contest Opposer's entitlement to a statutory cause of action. 16 TTABVUE 19.

#### **IV. Priority**

There is no dispute that Opposer used HEADSTRONG for its charitable fundraising services before Applicant used HEADSTRONG for any services. 28 TTABVUE 11-17 (Colleluori Tr. 9-15). Applicant argues, however, that Opposer did not begin offering mental health or emotional support services until after Applicant began offering its mental health services. 38 TTABVUE 16-17. The record belies Applicant's argument.

In fact, Opposer intended to provide mental and emotional health services from its inception. More importantly, it has done so since years prior to Applicant's first use of HEADSTRONG in 2012. Indeed, it has done so since its "very, very beginning." 28 TTABVUE 18-20, 42-46, 77-82, 145-46, 185, 273 (Colleluori Tr. 16-18, 40-44, 75-80, 143-44 and Exs. 2, 8, 22, 23); 31 TTABVUE 8. Thus, Opposer has priority of use for charitable fundraising services generally and its associated mental and emotional health services made possible by the fundraising specifically.<sup>9</sup>

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<sup>9</sup> Applicant's argument that Opposer did not plead prior use of its mark for mental or emotional health-related services specifically, 38 TTABVUE 16, is not well-taken, because the issue was tried by implied consent. Indeed, Applicant specifically asked about Opposer's mental health services during discovery, 23 TTABVUE 27-28 (Interrogatory Nos. 32-34), and did not object to Opposer's trial evidence about its mental health services. *See* TBMP § 507.03(b) and cases cited therein. Furthermore, in its notice of opposition, Opposer referenced "charitable fundraising services for patients and families affected by cancer" in the context of its own pending application to register its mark; this recitation is broad enough to encompass fundraising for mental and emotional health services for cancer patients. 1 TTABVUE 4 (Notice of Opposition ¶ 2). But that application is not at issue here, as Opposer

## V. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

### A. The Marks

The marks are highly similar in “appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En*

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relies on its common law rights rather than its pending, later-filed application. Opposer pled in its notice of opposition that “Applicant’s services” include, specifically, “mental health services,” and are “closely related to Opposer’s services.” *Compare*, 1 TTABVUE 3 (Notice of Opposition ¶ 1), *with*, 1 TTABVUE 4 (Notice of Opposition ¶ 6). Applicant was free to, and did, explore the specifics of this alleged relationship during discovery and trial.

1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In fact, the only difference between Opposer’s mark HEADSTRONG FOUNDATION and Applicant’s mark HEADSTRONG is the descriptive or generic and disclaimed word “FOUNDATION.” This distinction does not make a meaningful difference.<sup>10</sup>

To the contrary, it is settled that descriptive or generic terms, such as FOUNDATION for charitable services,<sup>11</sup> are entitled to less weight in our analysis. *Cunningham*, 55 USPQ2d at 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *see also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ). Thus,

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<sup>10</sup> In fact, there is some ambiguity as to whether Opposer pleads prior common law use of HEADSTRONG alone, or the composite HEADSTRONG FOUNDATION. Specifically, Opposer pleads that it “is the owner of Trademark Application Serial No. 88110610 for the mark HEADSTRONG (‘Opposer’s Mark’),” when in fact the referenced application is for the composite HEADSTRONG FOUNDATION. Ultimately, for the reasons explained here, there is no meaningful difference between these versions of the mark, and the result here would be the same whether Opposer is relying on HEADSTRONG alone or the composite HEADSTRONG FOUNDATION.

<sup>11</sup> We take judicial notice that a “foundation” is “an organization that has been created in order to provide money for a particular group of people in need of help or for a particular type of study.” [dictionary.cambridge.org/us/dictionary/english/foundation](http://dictionary.cambridge.org/us/dictionary/english/foundation). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

“HEADSTRONG” is the dominant portion of Opposer’s mark. The term is also dominant because it comes first. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Because the dominant portion of Opposer’s mark is identical to Applicant’s mark, the marks are quite similar.

Indeed, the marks look<sup>12</sup> and sound alike. While we have not ignored the term FOUNDATION in Opposer’s mark, it will be perceived not as a source identifier but instead as merely describing Opposer’s entity type, an entity type that could very well also be perceived as identifying another nonprofit charitable organization with a focus on military veterans, such as Applicant. As Applicant points out, the term FOUNDATION “carries a specific meaning denoting a charitable or nonprofit organization,” 38 TTABVUE 22, such as Applicant and Opposer.

In fact, because FOUNDATION is not distinctive, the marks also convey highly similar meanings and create virtually identical commercial impressions. Specifically, the marks’ shared term HEADSTRONG conveys willfulness, a term applicable to

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<sup>12</sup> It does not matter that Opposer typically displays its mark as HEADstrong, with “strong” in lower case lettering. Applicant seeks registration of its mark in standard characters, and any resulting registration would thus entitle Applicant to display its mark in the exact same way: HEADstrong. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012).

many cancer patients and veterans in need of help, including mental or emotional healthcare and related services. Donors and recipients of the parties' services could perceive Applicant's mark as a shortened version of Opposer's. This factor weighs heavily in favor of finding a likelihood of confusion.<sup>13</sup>

### **B. The Services, Their Channels of Trade and Classes of Consumers**

The services need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the services are marketed in a manner that "could give rise to the mistaken belief that [the services] emanate from the same source." *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause

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<sup>13</sup> Applicant's argument that Opposer's mark is weak due to "the widespread use of HEADSTRONG in the charitable fundraising sphere," 38 TTABVUE 20-21, is unsupported by probative evidence and is therefore not persuasive. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) ("Attorney argument is no substitute for evidence.") (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel). Indeed, Applicant bases this argument on mere Internet printouts, unaccompanied by supporting testimony, purporting to show that certain apparently charitable organizations were using HEADSTRONG. But, as explained in connection with Opposer's evidentiary objections, these materials are not admissible for the truth of the matter asserted and thus do not establish widespread third-party use, much less widespread and current third-party use, of the term HEADSTRONG for charitable services. The number of alleged uses also pales in comparison to the number found to be persuasive in, for example, *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015). As an aside, we note that notwithstanding Applicant's claim to the contrary, Opposer was previously unaware of all but one of these alleged uses. 28 TTABVUE 117-124 (Colleluori Tr. 115-122).

confusion about the source or origin of the goods and services.”); *Recot*, 54 USPQ2d at 1898 (“even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods”); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (2007).

Here, Applicant seeks registration for “charitable fundraising in connection with mental health programs for military veterans” and “mental health services” for military veterans, while Opposer has established prior use of its HEADSTRONG FOUNDATION mark for charitable fundraising and mental and emotional healthcare services for cancer patients. Thus, both parties offer mental health services and charitable fundraising. These similarities are sufficient to result in consumer confusion between the parties’ highly similar marks.

In fact, consumers familiar with HEADSTRONG FOUNDATION, a nonprofit/charity that raises funds and provides mental health services for cancer patients, who later encounter HEADSTRONG, a nonprofit/charity focused on fundraising and providing mental health services for veterans, could very well perceive the organizations to be affiliated in some way. Specifically, both entities provide the same types of services under the mark HEADSTRONG, and the fact that their services are provided to different types of recipients could signal not that the providers are unconnected, but instead that one is an affiliate, licensee or outgrowth of the other. This is especially so because cancer patients and veterans are not mutually exclusive classes of consumers. To the contrary, all too many veterans are

also cancer patients, and it is common knowledge that some veterans attribute their cancer to events or exposures during their military service. In short, because the parties both provide mental health services and charitable fundraising in connection therewith, the services (as opposed to the channels of trade and classes of consumers) are identical, or at the very least quite closely related. This factor also weighs in favor of finding a likelihood of confusion.

There are differences between some of the channels of trade and classes of consumers for the parties' services, to the extent that: (1) the cancer patients who benefit from Opposer's services are not also veterans or military service members; (2) the veterans and military service members who benefit from Applicant's services are not also cancer patients; (3) donors to cancer-related charities may not also donate to veterans-related charities; or (4) donors to veterans-related charities may not also donate to cancer-related charities. At the same time, however, we do not need evidence to know that some cancer patients, i.e. the classes of consumers for Opposer's services, are also veterans or military service members, or to know that some veterans or military service members, i.e. the classes of consumers for Applicant's services, are or unfortunately will become cancer patients. In other words, overlap among these groups of donors and beneficiaries is inevitable, meaning that some donors to veterans causes and beneficiaries thereof will be exposed to services for cancer patients, while some donors to cancer patient-related causes and beneficiaries thereof will be exposed to veteran and military service member-related services. Furthermore, the record reflects that the parties fundraise in similar ways.

*Compare*, 28 TTABVUE 20-27, 68-74, 85-87 (Colleluori Tr. 18-25, 66-72, 83-85), *with*, 32 TTABVUE 4-6 (McDonough Dec. ¶¶ 13-24). Thus, we infer that there is at least some overlap between the channels of trade and classes of consumers for the parties' services. This factor also weighs in favor of finding a likelihood of confusion.

### **C. Consumer Sophistication and Care**

Opposer argues that “[m]ilitary veterans affected by mental illness or crises and families affected by cancer are arguably preoccupied by other issues and may not be as careful when seeking help, especially when two charitable entities share an identical name.” 37 TTABVUE 19. Applicant argues that “mental health services are provided through professionals, and consumers seeking such services must undergo an a (sic) 30-minute phone intake and an initial evaluation by a psychiatrist before even receiving such services.” 38 TTABVUE 25.

While there is scant evidence on this factor, we agree with Applicant that consumers will exercise care in choosing mental health services and healthcare generally. While some of Opposer's mental and emotional health services appear to be more informal and perhaps more episodic than Applicant's, recipients of mental and emotional healthcare will likely choose services and providers more carefully than they would everyday consumer products or services. Moreover, we assume that many donors concerned with veterans, military service members or cancer patients will have very personal reasons for choosing particular charities, and that they will receive intangible but quite meaningful benefits from their donations. We therefore find that this factor weighs against a finding of likelihood of confusion.

**D. Actual Confusion**

Actual confusion “is strongly indicative of a likelihood of confusion.” *Thompson v. Haynes*, 305 F.3d 1369, 64 USPQ2d 1650, 1655 (Fed. Cir. 2002). Here, at the very least, Opposer’s evidence reveals some confusion about whether there is an affiliation between Opposer and Applicant.

In fact, two unrelated veterans (Applicant’s target beneficiary group) contacted Opposer, one seeking therapy for her and her husband, another seeking “any recourses for my head” (Applicant’s services). 28 TTABVUE 51-54, 313, 314 (Colleluori Tr. 49-52 and Exs. 10 and 11). These examples are evidence of actual confusion. *Cf. Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1552-53 (TTAB 2012) (mistaken assumption by one witness that, and question from another witness whether, one party offered another party’s goods found to constitute actual confusion).

While Applicant is correct that none of these veterans mentioned Applicant specifically, *see* 38 TTABVUE 27, we infer that Opposer’s mark HEADSTRONG FOUNDATION is the reason these target “consumers” of Applicant’s services mistakenly contacted Opposer rather than Applicant HEADSTRONG. There is no other evident reason why they would have done so. Moreover, while these veterans were “referred” to Opposer, the mistakes were ultimately made by the veterans who contacted Opposer rather than Applicant.

Applicant’s argument that none of Opposer’s evidence “identifies Applicant at all,” 38 TTABVUE 27, is belied by the January 27, 2021 e-mail offering an “automated mental health support chat.” 28 TTABVUE 56-57, 318-19 (Colleluori Tr. 54-55 and

Ex. 14). Indeed, that e-mail begins “I’ve come across an interview with **your** CEO Jim McDonough,” i.e. Applicant’s CEO. *Id.* (emphasis added). While this e-mail was not from a veteran, or target “consumer,” but instead a salesperson, it nevertheless reflects confusion between one charity called HEADSTRONG and another called HEADSTRONG FOUNDATION, especially where both charities offer mental health-related services and the e-mail offered products and services in that field. The same is true of the UFC’s mistaken tag of Opposer in promoting its event supporting Applicant. 28 TTABVUE 60-62, 323 (Colleluori Tr. 58-60 and Ex. 17). Furthermore, while it appears that Opposer did not actually provide services to those who were confused, in some cases that is because Opposer explained the situation and referred people who were confused to Applicant.

While this evidence is perhaps not overwhelming, especially because those who were confused have not testified, *Edom Labs.*, 102 USPQ2d at 1552-53, when we consider it as a whole, we find that it is sufficient to establish that there has been at least some actual confusion. We hasten to add, however, that even if we did not consider any of this evidence, our ultimate conclusion on the likelihood of confusion would be the same. This factor weighs in favor of finding a likelihood of confusion.

## **VI. Conclusion**

The marks are identical in-part and highly similar overall, the services are at least related and the channels of trade and classes of consumers overlap to some extent. There has also been at least some actual confusion. On balance, these factors outweigh any consumer care in purchasing. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *Carlisle Chem. Works, Inc. v. Hardman*

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*& Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970); *see also*, *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweighed sophisticated purchasers, careful purchasing decision, and expensive goods). Confusion is likely.

**Decision:** The opposition to registration of Applicant's mark on the ground of likelihood of confusion is sustained.